Office - Supreme Court, U.S.
FILED
OCT 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-602

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALFRED M. LAWSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRUCE C. BEREANO
COUNSEL OF RECORD
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301) 267-0410

MARTHA F. RASIN
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301) 267-0410

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals for the Fourth Circuit rendered a decision in conflict with the decisions of other federal courts of appeals and contrary to the intentions of Congress when it ruled that in the prosecution of a pharmacist for illegally dispensing drugs pursuant to fraudulent prescriptions (21 U.S.C. 841 (a)) the government need not prove that the "prescriptions" were illegitimate.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW. .	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED. .	4
STATEMENT OF THE CASE.	8
REASONS FOR ALLOWING THE WRIT. .	13
CONCLUSION	22
APPENDIX A:	
Opinion Sought to Be Reviewed, United States v. Lawson, 682 F.2d 480 (4th Cir. 1982).	A-1
CERTIFICATE OF SERVICE	A-17

TABLE OF AUTHORITIES

Page

Cases

Doremus v. United States, 262 F. 849 (5th Cir. 1920) . . . 14

United States v. Curtis, 229 F. 288 (N.D. N.Y. 1916) . . . 14

United States v. Eckert, 7 F.2d 257 (8th Cir. 1925) 14

United States v. Fleming, 251 F. 932 (W.D. Pa. 1918) 14, 15

United States v. Greenberg, 335 F. Supp. 364 (D.C. Pa. 1971). 15

United States v. Hayes, 595 F.2d 258 (5th Cir.), cert. denied, 444 U.S. 866 (1979) . 18-19

United States v. Irwin, 661 F.2d 1063 (5th Cir. 1981) 18

United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976) 13

Statutes and Regulations

Page

Harrison Anti-Narcotic Act, 26 U.S.C. § 4701 et seq. (repealed by Pub. L. 91-513, § 1101, 82 Stat. 1292 (1970)). 4, 13, 15

Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 et seq. 15

21 U.S.C. § 829(a) 5-6, 16
§ 841(a) 6, 8, 13, 20
§ 846. 8

21 C.F.R. § 1306.04. . . . . 6, 8, 16

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ALFRED M. LAWSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Alfred M. Lawson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this cause on June 24, 1982.

OPINIONS BELOW

The June 24, 1982 opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is published in volume 682 of Federal Reporter 2d Series, at pages 480 etc. and is reprinted in Appendix A to this Petition.

The United States District Court for the District of Maryland, which was the trial court in this matter, issued no reported opinion.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was made on June 24, 1982, and a copy thereof is appended to this Petition in Appendix A.

Petitioner's petition for rehearing and suggestion for rehearing en banc was denied by the United States Court of Appeals for the Fourth Circuit on August 6, 1982.

This Court has jurisdiction to review the judgment rendered below pursuant to the provisions of Title 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case involves the statutory provisions cited below:

Harrison Anti-Narcotic Act (in relevant part), 26 U.S.C. § 4705 (repealed by Pub. L. 91-513, § 1101, 84 Stat. 1292 (1970)).

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the state, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for a period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply-

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon regularly registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date and the *name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription, issued by a physician, dentist, or veterinary surgeon registered under this act: Provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees and officials hereinbefore mentioned.

21 U.S.C. § 829(a)

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance

in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

21 U.S.C. 841(a)

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to create, distribute or dispense, a counterfeit substance.

21 C.F.R. § 1306.04(a)

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the

usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

STATEMENT OF THE CASE

Proceedings Below. Alfred Lawson was indicted in the United States District Court for the District of Maryland in case number CR-M-80-0391 on October 28, 1980 for violations of 21 U.S.C. 841(a), 846 and 21 C.F.R. § 1306.04. A jury returned a verdict finding Lawson guilty of count one (conspiracy), counts two through eight (distribution of preludin and tuinal from the Fenwick Pharmacy between October of 1976 and April, 1977) and counts nine through twenty-two (distribution of dilaudid from Lawson and Son Pharmacy between April, 1978 and February, 1979). He was acquitted on counts nine, ten and eleven (distribution of dilaudid from Hyattsville between January, 1978 and March, 1978).

His co-defendant, Thomas Lane, another pharmacist, was found guilty of conspiracy (count one) and fourteen counts (nine through twenty-

two) of distribution of dilaudid. Lane was found dead several days after the verdict was entered. On that basis, the verdict against him was set aside and the indictment dismissed.

On February 2nd, Dr. Lawson's motion for a new trial and motion for judgment of acquittal was denied. Notice of Appeal was timely filed.

Dr. Lawson was thereafter sentenced to one hundred and seventy-nine days incarceration with the balance of the five-year sentence suspended. A five-year probationary term was imposed to begin after the one hundred and seventy-nine day term.

Dr. Lawson's appeal to the United States Court of Appeals for the Fourth Circuit was decided on June 24, 1982. That court affirmed his conviction, and subsequently denied Petitioner's request

for rehearing.

Statement of Facts. This case concerns three main parties: two pharmacists and one non-pharmacist. Alfred Lawson, your Petitioner, was the registered pharmacist in charge of the Fenwick Pharmacy at Ocean City, Maryland. Thomas Lane was the registered pharmacist in charge of Lawson and Son Pharmacy in Hyattsville, Maryland near Washington, D.C. Dr. Lawson was the managing pharmacist at Lawson and Son until 1973 when he moved to the Fenwick Pharmacy. From 1973 until after his trial in 1981 Dr. Lawson continued to fill in occasionally (about six times annually) as a relief pharmacist at the Hyattsville pharmacy as well as manage the Fenwick Pharmacy.

This case concerns two sets of prescriptions: one set was for Schedule II drugs preludin and tuinal, purportedly written by Dr. Lynn Possinger of Phila-

delphia, Pennsylvania, filled by Dr. Lawson or his assistant at the Fenwick Pharmacy in 1976 and 1977; the other was for Schedule II drug dilaudid, purportedly written by Dr. Marshall Nickerson of Washington, D.C., filled by Thomas Lane and his assistants at the Hyattsville pharmacy during 1978 and 1979. Both sets of prescriptions were presented at the respective pharmacies by the third main figure, Ronald Smith.

There was no question at trial that the purported prescriptions had been filled and that the drugs were dispensed. The crucial issue as to both sets of prescriptions was whether either of the pharmacists possessed guilty knowledge when they filled these prescriptions, i.e., whether they actually knew or had reason to know that the "prescriptions" Ronald Smith presented to them were illegitimate.

It is this inquiry and the underlying inquiry regarding the circumstances under which the prescriptions were written, that form the focus of this petition.

REASONS FOR ALLOWING THE WRIT

This petition for writ of certiorari should be granted to prevent a diversity of law as to the necessity of proving the illegitimacy of prescriptions in prosecutions of pharmacists under 21 U.S.C. § 841(a) for illegally dispensing drugs.

In regulating the use of various narcotics, Congress has traditionally carved out certain exceptions to the general rule prohibiting trading and dealing in dangerous drugs. The Harrison Anti-Narcotic Act, 26 U.S.C. § 4701 et seq. (repealed by Pub. L. 91-513, § 1101, 84 Stat. 1292 (1970)), made it unlawful to sell certain narcotics without a proper government form. Id. § 4705. That prohibition did not apply, however, to physicians who dispensed drugs to patients in the course of their professional practice or to pharmacists who dispensed drugs by filling a doctor's written prescription. Id. If prescrip-

tions were not written in the course of their professional practice, doctors bore the same guilt as any other violator. However, a druggist shared no culpability for filling prescriptions written by doctors outside their professional practices, so long as the prescriptions were in proper form. United States v. Fleming, 251 F.932 (W. D. Pa. 1918); Doremus v. United States, 262 F. 849 (5th Cir. 1920); United States v. Eckert, 7 F.2d 257 (8th Cir. 1925); contra, United States v. Curtis, 229 F. 288 (N.D.N.Y. 1916). In the absence of an allegation that the doctor and the pharmacy were conspiring to break the law, the pharmacist's mens rea was not in issue. He was fully protected if he could produce a doctor's prescription, legitimate or not, for the drugs he dispensed and courts were forbidden from considering what went through the pharmacist's mind when he filled a prescription which

appeared questionable. United States v. Fleming, 251 F. 932, 934-935 (W. D. Pa. 1918).

In 1970 Congress repealed the Harrison Anti-Narcotic Act and enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, § 1101, 84 Stat. 1292(1970)(codified in 21 U.S.C. § 801 et seq.). This new law was created to strengthen the existing laws, United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975) cert. denied, 425 U.S. 971 (1976), and to continue to control traffic and abuse of certain drugs. United States v. Greenberg, 335 F. Supp. 364 (D. C. Pa. 1971). The newer law is similar to the Harrison Anti-Narcotic Act. It declares a general rule making it unlawful to distribute or possess certain drugs, and then creating an exception covering the dispensation of drugs by

physicians and pharmacists pursuant to prescriptions. See, 21 U.S.C. § 829(a). The regulations promulgated to supplement and support the law make it clear, however, that pharmacists are no longer "off the hook" when they automatically fill prescriptions which doctors write outside their proper professional practice.

> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner,but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. § 1306.04 [Emphasis added]. Clearly, then, even though they may not know one another, a physician and a pharma-

cist now share criminal responsibility when a "purported prescription" is filled, i.e., one not "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." Id.

Under this new concept of conferring on pharmacists additional duties in aid of curbing drug abuse through prescription fraud, courts must ask a two-part question: was the prescription filled by the pharmacist a legitimate one and, if so, did the pharmacist know or have reason to know that it was not legitimate? If the first part of the question is answered in the affirmative, there is no reason to consider the second. If the prescription is good, there is no crime in filling it, regardless of how unusual or suspect it may be. The Fifth Circuit recently confirmed that this is the law,

stating:

> It is unlawful to dispense a controlled substance except as authorized by law. 21 U.S.C. § 841(a)(1). Pharmacists are authorized to dispense controlled substances pursuant to prescription, see 21 U.S.C. § 829, but 21 C.F.R. § 1306.04(a) limits that authorization. The prescription must be issued for a legitimate medical purpose by an individual physician acting in the usual course of his professional practice. While the responsibility for the proper prescribing and dispensing of controlled substances is upon the physician, the regulation imposes a "corresponding responsibility" upon the pharmacist who fills the prescription. Thus, the regulation provides that, if an order purporting to be a prescription is not a prescription despite its appearance and, if the pharmacist knows that it was not issued in the usual course of professional treatment, both the person issuing the ostensible prescription and the person who knowingly fills it shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances. 21 C.F.R. § 1306.04(a).

United States v. Irwin, 661 F.2d 1063, 1069 (5th Cir. 1981). The Fifth Circuit case of United States v. Hayes, 595 F.2d 258 (5th Cir.) cert. denied, 444 U.S. 866 (1979) states accordingly: "What is required of . . . [the pharmacist] is the responsibility not to fill an order that

purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice." Id. at 261 (footnote omitted).

The opinion of the federal appellate court in Dr. Lawson's case is to the contrary.

In the instant case against Dr. Lawson, the trial judge recognized the necessity of proof by the government that the prescriptions filled by Dr. Lawson were bogus, although his instruction to the jury on this point was not very clear. The judge told the jury that it should determine whether the defendant pharmacists "knowingly filled the prescriptions other than for a legitimate medical purpose and other than in the usual course of a doctor's medical practice."

Dr. Lawson appealed his conviction to the United States Court of Appeals for the Fourth Circuit, arguing that the trial court erred in allowing a pharmacist to testify as an expert not only on the second issue of whether a pharmacist presented with certain prescriptions would have reason to know they may be illegitimate, but also on the threshhold issue of legitimacy of the prescriptions. That court addressed the appellate argument by stating that "[a]dmittedly, the only issue is whether the pharmacist knew the prescriptions were not genuine," Appendix at A-10, thereby denying that any such threshhold issue exists. In so doing, that court not only contravened established law from other circuits on the requirements of proof in prosecutions of pharmacists under 21 U.S.C. 841(a), and ignored the plain meaning of the statutes upon which

the case is based, but also allowed to stand a conviction in the trial court which was supported, in part, by unfounded and improperly admitted "expert" testimony. By allowing that conviction to stand the appellate court has sanctioned the trial court's departure from the accepted and usual course of judicial proceedings.

Clearly, then, if the appellate opinion remains unaddressed by this court, authority will exist in the Fourth Circuit which will be contrary to that of other circuits and, more important, contrary to the declarations of Congress.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that a writ of certiorari issue to review and correct the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

BRUCE C. BEREANO
COUNSEL OF RECORD
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301) 267-0410

MARTHA F. RASIN
195 Duke of Gloucester Street
Annapolis, Maryland 21401
(301) 267-0410

Attorneys for Petitioner